SUPREME COURT, U. S.

JUL 2 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1828

OLGA HOCHFELDER, et al.,

Petitioners,

vs.

MIDWEST STOCK EXCHANGE,

Respondent,

LEON S. MARTIN, et al.,

Petitioners,

vs.

MIDWEST STOCK EXCHANGE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the District Court is officially reported at 350 F.Supp. 1122 and is reproduced in the appendix hereto. The opinion of the Court of Appeals has not been officially reported. It has been unofficially reported at CCH Fed. Sec. L. Rep. ¶94,499 [Current Binder] and appears in the appendix to the petition herein.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1974. No petition for rehearing was filed. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1) and jurisdiction in the courts below was properly invoked under 15 U.S.C. § 78aa.

QUESTION PRESENTED

Whether the Court of Appeals correctly ruled, on the undisputed facts, that as a matter of law respondent Midwest Stock Exchange fulfilled its responsibilities to plaintiffs under Section 6 of the Securities Exchange Act of 1934.

STATEMENT

Petitioners brought suit against the Midwest Stock Exchange (sometimes hereinafter referred to as "Midwest") contending that Midwest was liable to them in connection with an alleged fraud perpetrated by an officer of a member organization of Midwest. Midwest moved for summary judgment and supplied extensive affidavits in support of its contention that it had no knowledge of the fraud and as a matter of law it had discharged whatever duties it may have owed petitioners. Both the District Court and the Court of Appeals held that the record did not raise any genuine issue of a material fact and summary judgment was granted in favor of Midwest. The facts before both courts included the following.

Midwest and predecessors* were, at all times material to these actions, national securities exchanges registered with the Securities and Exchange Commission ("SEC")

* All references to Midwest prior to 1949 refer to the Chicago Stock Exchange. Midwest was formed in 1949 through a merger of the Chicago and other stock exchanges.

pursuant to Section 6 of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78f. First Securities Company of Chicago ("First Securities"), with Leston B. Nay as president, was first approved for membership in Midwest in 1944. In November, 1945, Nay applied to be the nominee of First Securities. (Each member organization of Midwest had a nominee, who was the individual representing the member organization for certain purposes, such as casting its vote in Midwest matters or trading on the exchange floor.) The change in nominee required a reapplication for membership by First Securities. All the necessary papers were filed in proper form by Nay and by First Securities, including letters of recommendation from banks and members of Midwest. A hearing was held on Nay's application before the Admissions Committee and Nay appeared to answer questions.

After the Admissions Committee unanimously recommended that Nay be admitted to membership as nominee of First Securities, the notice of the proposed transfer to Nay from the prior nominee was posted on Midwest's trading floor and mailed to all members. The notice stated the duty of all members to inform the secretary of Midwest "of any reason known to them why [Nay] would not make a desirable member of the Exchange." Although Nay had worked in Chicago's financial community for nearly twenty-five years, no one communicated any unfavorable information to Midwest.* In December of 1945 Nay's application was unanimously approved by the Executive Committee of Midwest. Nay, as nominee of First Securities, was then issued a certificate, the post-1949 version of which is set forth at page 5 of the petition herein.

* Petitioners have apparently dropped the claim, urged vigorously below, that one reason Midwest's admissions process was deficient was that it did not investigate Nay's change of his first name upon his migration to the United States in 1921 or the circumstances of his divorces in 1925 and 1935. (Pet., p. A6)

Over the years Nay's conduct was, as far as Midwest knew, in full accord with the requirements of the 1934 Act, the rules of the SEC and the rules of Midwest. Although Nay's personal books and records were not examined,* First Securities (including, of course, Nay's business conducted through First Securities) was at all times subject to thorough surveillance by Midwest. For example, Midwest's own personnel periodically conducted a "field examination" which consisted of an examination and inspection of the books and records of the member organization. This was supplemented by interviews with personnel of the member firm. Prior to its first use in 1956, the written field examination program was submitted to the SEC for its comments.

Each member organization was also required to submit to Midwest each year two audited financial questionnaires, one of which was to be certified by an independent public accountant selected by the member organization and approved by Midwest. The audits were conducted pursuant to SEC Form X-17A-5, as amended from time to time by the SEC. The audit submitted by the accountant would then be reviewed by Midwest to verify compliance with applicable rules, including Midwest's net capital requirements.**

Ernst & Ernst, the independent auditors for First Securities, annually submitted the audited financial questionnaires of First Securities to Midwest as required by its rules. Midwest relied upon Ernst & Ernst to conduct the audits

* Midwest's surveillance program did not involve examination of personal books and records of officers or employees of member organizations because, under its rules, all business with the public was required to be conducted by member organizations or partnerships, as distinguished from individuals.

** In late 1967, shortly before Nay's suicide, Midwest determined from a review of a routine financial questionnaire submitted to it by First Securities that First Securities had a small net capital deficiency. First Securities was quickly brought into compliance with Midwest's net capital requirements.

of First Securities in accordance with applicable rules and regulations of Midwest and the SEC, as well as generally accepted auditing standards. The audits conducted by Ernst & Ernst were required to and did include a review of First Securities' internal controls.

Unbeknown to Midwest or to any other regulatory or self-regulatory body, beginning in 1942 Nay began a fraud in the nature of a "Ponzi" scheme.* Nay allegedly induced petitioners herein to place funds in a fictitious "escrow" account which he represented would pay interest to them at 9% or, in some cases, 12% per annum at a time when the prevailing rate was less than 4%. Nay allegedly converted to his own use the money placed with him and upon his suicide in June, 1968 no funds remained in the "escrow."

The "escrow" transactions between petitioners and Nay were clearly personal, for the following reasons among others. Interest payments were made directly by Nay to petitioners and, as they knew, Nay claimed those payments as deductions on his personal federal tax returns. The transactions were not conducted through First Securities and no aspect of the "escrow" transactions was shown on the books and records of First Securities. In particular, the "escrow" transactions were never reflected on petitioners' periodic statements received from First Securities.

Despite the extensive examination and auditing requirements applicable to member firms, neither Midwest nor Ernst & Ernst uncovered the personal "escrow" scheme, nor did any petitioner or anyone else bring it to the attention of Midwest. It is undisputed that at no time until Nay's suicide did anyone at Midwest know of the "escrow" scheme.

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* *Cunningham* v. *Brown*, 265 U.S. 1 (1924).

These two actions brought against Midwest were filed in February and May of 1971, respectively. The District Court rendered a summary judgment for Midwest in both cases in October, 1972. Petitioners have never asserted that they did not have ample opportunity to conduct discovery to develop facts in opposition to the facts set forth in the affidavits filed by Midwest in support of its motion. The District Court stated:

> The facts insofar as Midwest's defenses are concerned are contained in several affidavits filed with its motion demonstrating its relationship to Nay and First Securities. These facts are not controverted by counter-affidavits. The remaining question, therefore, is whether any genuine issues of material fact exists [sic] between the parties to this litigation. We believe there are none and that the only issues remaining to be decided are issues of law. (350 F.Supp. 1122, 1124; App., p. A2)

Likewise, the Court of Appeals stated:

> The district court found there to be [no genuine] issues of material fact and, as our opinion will demonstrate, we agree. Since no material facts are in dispute we must then make inquiry whether, on the basis of the uncontroverted facts, the district court correctly found as a matter of law that Midwest has incurred no liability under the Securities Exchange Act of 1934. (Pet., p. A3)

Both courts then concluded that, as a matter of law, on the undisputed facts, Midwest had discharged whatever responsibilities it owed petitioners in connection with Nay's personal Ponzi scheme.

ARGUMENT

Much of petitioners' argument relates to their contention that they were not given an opportunity to establish before a jury that respondent did not discharge its responsibilities to them under Section 6 of the 1934 Act.* It is important to note that petitioners do not contend that they were deprived of any opportunity to engage in discovery or to present facts in opposition to respondent's affidavits. Since petitioners had ample opportunity to do both but offered no evidence to controvert respondent's affidavits, it can only be assumed that they had none. Thus petitioners' claim that they were deprived of an opportunity to present their case to a jury has no substance.

In the absence of evidence contrary to that supplied by respondent, the courts below correctly concluded that there was no genuine issue of a material fact and the only questions presented were ones of law. Petitioners take issue with the standard of duty applied to respondent by the Court of Appeals, but their position is based upon a misreading of that opinion. When the opinion is properly read, it is apparent that the Court of Appeals rendered a decision which is consistent with decisions in other circuits, with the policy behind the concept of self-regulation embodied in the 1934 Act and with the undisputed facts of this case.

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* In the courts below petitioners also contended that respondent was liable to petitioners for aiding and abetting Nay's alleged violation of Rule 10b-5 (17 CFR 240.10b-5), promulgated by the SEC pursuant to Section 10(b) of the 1934 Act (15 U.S.C. § 78j(b)), and for not having enforced Rule 27 of Article III of the Rules of Fair Practice of the National Association of Securities Dealers, Inc. Except for a passing reference to aiding and abetting, petitioners appear to have dropped those claims. Therefore, respondent will not state the reasons why the decision below was correct in those respects. Since the one theory of liability which petitioners now urge is based upon respondent's status as a national securities exchange, petitioners are not correct when they assert that the grounds for respondent's liability are "similar" to those asserted against First Securities itself in the case cited by petitioners. (Pet., p. 4)

I.

THE DECISION BELOW IS CLEARLY CORRECT AND WAS DECIDED IN ACCORDANCE WITH ESTABLISHED PRINCIPLES OF LAW.

In reaching the conclusion that respondent had met its responsibilities as a self-regulatory organization under the 1934 Act the Court of Appeals followed established precedent. It relied on its own decision in *Butterman* v. *Walston & Co.*, 387 F.2d 822 (7th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968), and the time-honored decision in *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir. 1944), *cert. denied*, 323 U.S. 737 (1944). These cases have been followed consistently. *Hughes* v. *Dempsey-Tegeler & Co., Inc.*, CCH Fed. Sec. L. Rep. ¶94,133 (C.D. Cal. 1973) [1973 Transfer Binder]; *Marbury Management, Inc.* v. *Alfred Kohn, Wood, Walker & Co.*, 373 F.Supp. 140 (S.D.N.Y. 1974), following the District Court opinion in the instant cases; *Caddell* v. *Goodbody & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,938 (N.D.Ala. 1972) [1973 Transfer Binder]; and *Steinberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CCH Fed. Sec. L. Rep. ¶ 94,599 (S.D. N.Y. 1974) [Current Binder]. These cases all stand for the proposition that an exchange has a duty to act only when it has knowledge of wrongful conduct by a member organization or reasonably should have had such knowledge under all the circumstances. In this case the undisputed facts established that respondent had no knowledge of Nay's fraud and nothing which came to respondent's attention merited more inquiry than was in fact made.

The court below held that the Section 6 duty of self-regulation

> is not a mandate of strict liability rendering the exchange a guarantor of all fraudulent schemes consummated by its members whether in listed or unlisted securities. To so read section 6 would tear at the very fabric of self-regulation, a burden which indeed no self-regulatory body could bear. The scope of the duty

> of self-regulation is not so far reaching. Rather, the scope must be delineated to include only those acts, events, schemes, or circumstances surrounding exchange members of which the exchange knows or has reasonable cause to know, or those events and circumstances which would reasonably put the exchange on notice, of a violation or suspected violation of a securities law, regulation or rule, or exchange rule. (Pet., p. A4; footnote omitted.)

The District Court similarly observed that the surveillance program of a securities exchange need not be "fluoroscopic." (350 F.Supp. at 1125; App., p. A4).

The standard so eloquently phrased by both courts below is in accordance with the provisions of Section 6 which requires only that a registered securities exchange agree

> to comply, and to enforce *so far as is within its powers* compliance by its members, with the provisions of [the 1934 Act], and any amendment thereto and any rule or regulation made or to be made thereunder. Section 6(a)(1), U.S.C. § 78f(a)(1). (Emphasis added)

The plain and only realistic meaning of this provision, as recognized by the courts below, is that an exchange undertakes to do whatever is reasonable in the circumstances, consistent with its role in the total regulatory structure and its other self-regulatory responsibilities. Unless so read, Section 6 would render an exchange an insurer of the conduct of every member and every individual connected with a member.

Applying the foregoing standard to the undisputed factual record, the Court of Appeals concluded, as a matter of law, that respondent had met its responsibilities under the 1934 Act, and that the facts which came to its attention in the course of its extensive program of surveillance did not require any further action on its part. (Pet., pp. A5-11)

Petitioners have done nothing more than grasp at a few isolated occurrences over a twenty-five year period which they contend should have alerted respondent to investigate Nay further, to probe into his personal life and to examine his tax returns. The Court of Appeals held that none of these incidents standing alone, nor all together, merited the kind of sweeping inquiry suggested by petitioners. (Pet., p. A11)

Petitioners' challenge to the decision below appears to be based on a misreading of the opinion. For example, petitioners suggest that the Court of Appeals established a rule of law permitting Midwest to escape liability by choosing "not to know" the facts of the alleged misbehavior. (Pet., p. 13) The Court of Appeals' actual holding was that Midwest in exercising its duty of self-regulation "did not fail to exercise the requisite care and conduct in admitting Nay to membership and allowing him to maintain his membership." (Pet., A5) Respondent did what was reasonably required of it under the 1934 Act and, having done so, it could not be held responsible to petitioners for Nay's fraud. The Court of Appeals held:

> [W]e are not prepared to place a burden of inquiry on an exchange which would effectively require scrutiny and investigation into all the personal affairs and activities of member nominees or the personal, business, and financial affairs of those individuals closely associated with member organizations. (Pet., p. A8)
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> • • •
>
> . . . To place such a burden on Midwest to inquire into affairs unrelated to the activities of the Exchange would be tantamount to making the Exchange a guarantor of losses resulting from every fraudulent, personal scheme engaged in by individuals associated with member organizations. Indeed, the implementation of such a burden of inquiry might well be counterproductive in that it would dissipate resources which

> are limited and needed for the basic self-regulatory actions in scrutinizing matters pertaining to member organization activities and affairs. (Pet., p. A9)

The Court of Appeals did not say that Midwest had no burden of investigation or surveillance as petitioners contend. (Pet., p. 8) It held that Midwest did have such a responsibility and that it had discharged it through the field examination program and audit requirement and otherwise.

Plaintiffs contend that the decision below precluded them from offering evidence of their reliance on the membership certificate issued by respondent. (Pet., p. 11) First, any lack of evidence on reliance was not due to any action by the District Court but rather to petitioners' failure to adduce such proof. More important, since respondent was held not culpable, reliance *vel non* by the petitioners was properly held to be irrelevant. (Pet., p. A16) As in any case, if a defendant can establish as a matter of law that a necessary element of the plaintiff's case cannot be proven (here, dereliction of duty), it is irrelevant to the ultimate decision whether or not the plaintiff could prove the other elements of his case (here, reliance).

Stripped to its essentials, the petition asks this Court to review the factual record and determine whether there were genuine issues of material fact, contrary to the conclusion reached by both courts below. Petitioners are thus asking this Court to do that which it eschews as a matter of policy. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962). Such a factual inquiry is especially unnecessary where both courts below have reached the same conclusion and petitioners themselves offered no facts to controvert respondent's affidavits.*

* Petitioners' request for this Court to review the factual record in these circumstances is particularly inappropriate since their

II.

THERE ARE ALTERNATIVE, INDEPENDENT GROUNDS IN SUPPORT OF THE DECISION BELOW

Petitioners contend that the Court of Appeals erred in holding that respondent had discharged its self-regulatory duties as a matter of law. As shown above, this holding was correct. However, even if this Court were to grant the petition and ultimately remand these cases for a trial on that issue, the judgment below for respondent could be reached on other grounds as a matter of law. Where there are such alternative grounds for reaching the same result below, it is inappropriate for this Court to grant certiorari on the one ground presented. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183-184 (1959) and cases cited.

First, there was no causal connection between respondent's alleged failure to act and petitioners' losses; in particular, the Court of Appeals held that as a matter of law there was no causal connection between the alleged dereliction by Midwest relating to First Securities' net capital deficiency in late 1967 and petitioners' losses. (Pet., pp. A11-12)

Second, respondent contended below that the petitioners' claims were barred by the statute of limitations. The District Court agreed. (350 F.Supp. at 1225; App., p. A5) The Court of Appeals held that if respondent were negligent, the statute of limitations might have been tolled, but only "until a plaintiff obtain[ed] knowledge or through due diligence should have obtained knowledge of the underlying fraud." (Pet., p. A18) While the Court of Appeals did not

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response to the motion for summary judgment consisted largely of reliance on allegations of their complaints which respondent had denied. As this Court has recognized, the party responding to a motion for summary judgment cannot rely on allegations in his complaint which are denied when the movant supplies admissible evidence. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968).

reach the question of petitioners' diligence, since it held in respondent's favor on other grounds, in a related case the District Court has held as a matter of law that these petitioners were not diligent in discovering Nay's fraud.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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* *Hochfelder* v. *Ernst & Ernst*, Case Nos. 71 C 454 and 71 C 1204 (N.D. Ill. August 1, 1973), *appeals pending*, Case Nos. 73-1907 and 73-1908 (7th Cir.). Ernst & Ernst, First Securities' accountant, was sued along with Midwest. In the cited opinion the District Court granted a summary judgment to Ernst & Ernst on the statute of limitations and other grounds and on the statute of limitations point said:

> "Under *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972), the statute is tolled if a plaintiff fails to discover the wrong without any fault or want of diligence or care on his part (455 F.2d at 128). In the case at bar, however, plaintiffs do not dispute the fact that they allowed Nay to conduct his improper activities and to conceal them from the defendant in various ways. Without denial, defendant has shown that plaintiffs made their investments in the form of checks payable to Nay individually, that they told the Internal Revenue Service as late as 1965 that Nay was paying interest to them on his personal indebtedness to them, and that they inaccurately confirmed their accounts at First Securities Company when requested by defendant to verify them. Thus plaintiffs not only did not exercise diligence or care to discover Ernst & Ernst's alleged negligence but they actively participated in causing this defendant's failure to discover the fraud when it audited First Securities Co. in 1967 and before. Acc. *Morgan* v. *Koch*, 419 F.2d 993 (7th Cir. 1969)."

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OLGA HOCHFELDER, THERESA W. ROTHERMEL, AGNES SMITH, EUGENE VIOTA, HELEN B. FELDKAMP, ANNA L. JESSE, WILLIAM P. JESSE, ERIC W. STUBBS, LURENTA T. STUBBS, HELEN C. ALLISON, LEON W. CARNOVSKY, ZERAH A. DRAKE, JOHN M. JACKSON, TRUSTEE, JOHN M. JACKSON, INDIVIDUALLY, AND ELIZABETH B. JACKSON,
Plaintiffs,

vs.

MIDWEST STOCK EXCHANGE and ERNST & ERNST,
Defendants.

No. 71 C 454

DECISION and ORDER

This cause comes on to be heard on the motion of defendant Midwest Stock Exchange for summary judgment or, in the alternative, for partial summary judgment. The defendant's motion was also filed with respect to the related case 71 C 1204, but the plaintiffs in that case have not yet filed their response. Since the attorneys for the plaintiffs in 71 C 1204 have represented in open court that the two cases are distinguishable, we will proceed to decide only 71 C 454 on the present pleadings. We find and conclude that the motion of defendant Midwest Stock Exchange in this case should be granted.

Plaintiffs' amended complaint against Midwest is founded on Section 10b of the Securities Exchange Act of 1934 (15

U.S.C. § 78j(b)) and S.E.C. Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5). Apparently as part of the 10b-5 violation, plaintiffs also allege that this defendant violated Section 6(a)(1) of the Securities Exchange Act (15 U.S.C. § 78f). This section, in part, requires a national securities exchange to file an agreement with the S.E.C. "to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder." Presumably such an agreement was filed by Midwest.

The background facts of this case are fully set forth in two recent opinions of the Seventh Circuit Court of Appeals in cases #71-1272 dated April 12, 1972 and #71-1422 dated August 1, 1972. The liability of Nay and his brokerage firm has thereby been established. These decisions also control some of the defendant's defenses. There is therefore no need to further review the sordid details except insofar as they relate to plaintiffs' claim against Midwest.

The facts insofar as Midwest's defenses are concerned are contained in several affidavits filed with its motion demonstrating its relationship to Nay and First Securities. These facts are not controverted by any counter-affidavits. The remaining question, therefore, is whether any genuine issues of material fact exists between the parties to this litigation. We believe there are none and that the only issues remaining to be decided are issues of law.

Insofar as any affirmative representation by Midwest is concerned, plaintiffs rely almost entirely on a certificate issued to Nay which was presumably displayed in his office and which stated:

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MIDWEST STOCK EXCHANGE

Organized 1882

An Association for Brokers, Whose Object is to Establish and Conduct a Market for Listed Securities, where High Standards of Commercial Honor and Integrity are maintained and Just and Equitable Principles of Trade and Business prevail.

This certificate of Membership is Issued to

LESTON B. NAY
of
First Securities Company of Chicago

/s/ Carl E. Ogren
Secretary

/s/ James E. Day
President

(This Certificate is the Property of
Midwest Stock Exchange)

Since Nay's dishonesty did not involve the sale of "listed securities" to plaintiffs, this certificate is not evidence of any violation of Rule 10b-5. It does not apply to the sale or issuance by Nay of promissory notes in his personal escrow account, and plaintiffs do not allege any impropriety in the purchase or sale of listed securities. They would not have been justified in relying on this certificate when they turned over the proceeds of sales of securities to Nay personally, and affirmative representations under Rule 10b-5 are required to be in connection with the purchase or sale of the security in question. Cf. *List* v. *Fashion Park Inc.*, 340 F.2d 457, 462-3 (2nd Cir. 1965), *cert. den.*, 382 U.S. 811 (1965), *Katz* v. *Amos Treat & Co.*, 411 F.2d 1046, 1053 (2nd Cir. 1969).

The remainder of plaintiffs' allegations against this defendant involve its alleged failure to investigate and supervise Nay's activities sufficiently to discover his fraud. No

case has been cited where this type of omission or practice gives rise to an action against an exchange under Rule 10b-5. The only cited case resulted in summary judgment for the exchange. *Butterman* v. *Walston & Co., Inc. et al.*, 387 F.2d 822 (7th Cir. 1967). As a matter of fact, it is doubtful that the language of Section 6(a)(1) supports an action by a third party except possibly as a contract beneficiary.

The other cited cases involve representations or omissions made with respect to the issuance or sale of specific securities. There is no indication that Rule 10b-5 was intended to make a national security exchange responsible for all of the personal transactions and financial stability of its members. Cf. *Buttrey* v. *Merrill Lynch et al.*, 410 F.2d 135 (7th Cir. 1969) for a typical case involving violations of a stock exchange rule by a broker.

Assuming, however, that Midwest could be liable for ineffectively policing its members' dealings in unlisted securities, the defendant's affidavits demonstrate that it adequately performed its agreement under Section 6(a)(1) of the Act. Although plaintiffs have shown instances where this defendant arguably was put on notice of Nay's untrustworthiness, these do not raise an issue of fact concerning the adequacy of the defendant's supervision, but merely tend to show that it was not fluoroscopic. Neither the law nor common sense requires perfection but only an agreement "to enforce so far as is within its powers compliance by its members. . . ." (15 U.S.C. § 78f). Defendant's affidavits establish this without contradiction.

The words of the Court of Appeals in #71-1422 involving a customer's claim against the broker are somewhat *apropos* to Midwest's position in this case:

> Nothing which occurred during the almost 25 years of Schueren's dealings with First Securities and Nay can be said to have put a reasonable person on notice that anything was amiss. . . . Even the trust department of the Union Bank was completely duped by Nay for more than a year after Schueren's death until Nay's suicide.

The court finds and concludes as a matter of law that Midwest performed its obligations under Section 6(a)(1) and that no triable issue of fact remains therein.

There is no longer any issue in this case that Nay violated Rule 10b-5 and committed fraud in the sale of "securities" (Case #71-1422, Seventh Circuit, August 1, 1972). It must also be assumed that he violated one or more of defendant's rules and regulation. This does not constitute fraudulent conduct by the defendant exchange, as occurred in *Carroll* v. *First National Bank of Lincolnwood*, 413 F.2d 353 (7th Cir. 1969), *cert. den.* 396 U.S. 1002 (1970). It also cannot be said from any of the facts or alleged facts in this case that defendant Midwest "aided and abetted" Nay in any actionable sense. *Wessel* v. *Buhler*, 437 F.2d 278 (9th Cir. 1971); see also *Brennan* v. *Midwestern United Life Insurance Company*, 417 F.2d 147, 154-5 (7th Cir. 1969), *cert. den.* 397 U.S. 989 (1970).

Defendant Midwest alternately contends that the three-year statute of limitations had run by the time this case was filed on February 19, 1971. Plaintiffs contend that the statute was tolled by fraudulent concealment, but the facts do not support this theory either. To toll the statute, the defendant must have actively concealed the cause of action, and Midwest clearly was not shown to have done this. The law on this point was not shown to be different than it was in *Morgan* v. *Kock*, 419 F.2d 993 (7th Cir. 1969). Since none of the plaintiffs entrusted funds to Nay after 1966, their claims are barred.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant Midwest Stock Exchange's Motion for Summary Judgment is granted, and this case is set for a status report along with No. 71 C 1204 on Wednesday October 11, 1972 at 10 a.m.

Enter:

/s/ Thomas R. McMillen
Judge, U.S. District Court

Oct. 3, 1972